Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1998

CHARLES SEABORN AND ROBERT HARRIS,

Petitioners,

vs.

**STATE OF FLORIDA,
DEPARTMENT OF CORRECTIONS,**

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeal for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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94 pp

QUESTION PRESENTED

I. Whether Petitioners, two African American males suffering from a skin condition, pseudo folliculitis barbae, causing them to be unable to shave, have a recognized cause of action under 42 U.S.C. §2000e et seq., after being denied promotions and being otherwise subjected to a hostile work environment within the Florida Department of Corrections due to the fact that they were unable to shave and maintained beards, contrary to the Respondent's anti-beard policy.

II. Whether Petitioners, two African American males suffering from a skin condition, pseudo folliculitis barbae, causing them to be unable to shave, have a recognized cause of action under 42 U.S.C. §12101, et seq., as opposed to the Rehabilitation Act, when their skin condition which caused Petitioners to maintain beards, affected the Petitioners ability to be promoted and thus limited their ability to work.

PARTIES TO THE PROCEEDING

The parties to this litigation are:

Plaintiffs (Petitioners)

Charles Seaborn

Robert Harris

Defendant (Respondent):

State of Florida,
Department of Corrections

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Appendix B - Opinion of the United States District Court, Northern District of Florida at Tallahassee, Fled February 11, 1997. . . . . .1b

Appendix C - Opinion of the United States District Court, Northern District of Florida at Tallahassee, Filed June 13, 1997 . . . . . 1c

Petitioners, Charles Seaborn and Robert Harris, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 143 F. 3d 1405 (11th Cir. 1998) (App. A). The opinion of the District Court dated February 11, 1997, is reprinted in Appendix B. The opinion of the District Court dated June 11, 1997, is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United Stated Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on June 16, 1998. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII, 42 U.S.C. §2000e et seq., prohibits employers covered by the statute from taking actions or engaging in practices that discriminate against workers or job applicants on the basis of their race, color, religion, sex or national origin. [42 U.S.C. §2000 e-2].

The Americans with Disabilities Act ("ADA"), 42 U.S.C. §12112(a) provides that

> [n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

The fundamental question in this case is whether persons such as the Petitioners, African American males, who have a skin condition commonly known as "PFB" (pseudo folliculitis barbae), and are thus unable to shave, have a cause of action under either 42 U.S.C. §2000e et seq., or 42 U.S.C. §12101 et seq.. This case arises in the context of an employment setting within the Florida Department of Corrections (hereafter "Department"), where the Petitioners were (are) employed, and which Department has an internal "no beard policy" with a limited exception allowing employees such as the Petitioner to maintain beards "when medically necessary." Both Petitioners presented medical documentation to the Department showing that they had PFB and that they needed to have beards due to their medical/skin condition. Although the Department permitted Petitioners to maintain beards, Petitioners were thereafter denied promotions and were subjected to a hostile work environment. Petitioner Harris was also terminated. The background of this case is set forth below.

A. Procedural Background

Petitioners initially filed this action pursuant to 42 U.S.C. §12101 et seq. (ADA claim) and 42 U.S.C. §2000e et seq. (Title VII claim). They claimed that they were treated

differently than their co-workers, were subjected to differential terms and conditions of their employment and were subjected to a hostile work environment in their employment with the Department of Corrections due to their disability, pseudo folliculitis barbae and/or their race. On February 11, 1997, the trial court entered an Order granting Defendant's Motion for Summary Judgment on the Plaintiff's ADA claim. On June 13, 1997, the trial court entered an Order granting Defendant's Motion for Summary Judgment as to Plaintiff's race discrimination claim.

Petitioners timely filed a Notice of Appeal with the United States District Court, Northern District of Florida, Tallahassee Division, on July 14, 1997. On June 16, 1998, the Eleventh Circuit Court of Appeals rendered its decision denying Petitioners relief under both Title VII and the ADA.

B. Statement of the Facts

At all times pertinent to this action, Petitioners were employees of the Department of Corrections and worked as correctional officers. Petitioners are both African American males who suffer from a skin condition known as pseudo folliculitis barbae (hereinafter "PFB"). During the course of their employment with the Department, it was separately determined by both of Mr. Seaborn and Mr. Harris that they suffered from PFB. Separately and without consulting each other, both Mr. Seaborn and Mr. Harris placed the Department, their employer, on notice that notwithstanding its "no beard policy", with an exception for "medical necessity", they needed to be able to grow beards due to their skin condition, PFB. Petitioners were then permitted to have beards. Thereafter, however, the conditions of their

employment changed and they were adversely affected in the terms and conditions of their employment.

Petitioners then filed the underlying civil action against the Department claiming that they were entitled to protection under Title VII (42 U.S.C. §2000e et seq.) and the ADA (42 U.S.C. §12101 et seq.). Petitioner Seaborn claimed that the medical need to maintain a beard caused him to be harassed in the workplace. He further claimed: (1) that he was treated differently than his coworkers because he was required to wear facial hair due to his skin condition; (2) that he was denied promotions when he was the more qualified applicant for the positions sought than the person actually promoted; and (3) that he was disciplined differently than other employees of the Department without facial hair. He claimed that his supervisors had taken actions against him when his non-bearded coworkers had not been disciplined for the same actions that he had been disciplined for. Petitioner Seaborn maintained that the adversity towards him in the imposition of disciplinary actions and his failure to be promoted were due at least in part to his race, facial hair and skin condition, PFB.

Petitioner Harris' claims were similar to those of Seaborn. He claimed that during the course of his employment with the Department, he was treated differently than his white coworkers because he was required to wear facial hair due to his skin condition. He claimed that he was denied employment opportunities when he was the more qualified applicant for positions than the person actually hired for the positions, and he was disciplined differently than employees of Department without facial hair. Harris claimed that he was unable to comply with the Department's "no beard" policy due to his skin abnormality, which was medically documented for his employer. He also claimed that his

supervisors took adverse actions against him different than his non-bearded coworkers. Harris then claimed that the adversity towards him in the imposition of disciplinary actions including his termination and his failure to receive favorable assignments and transfers was due at least in part to his race, facial hair and PFB.

The District Court disagreed and held that Petitioners had stated a claim of "beardism" as opposed to "racism" and that they were not protected employees under either Title VII or the ADA. The appeal followed challenging this ruling to the Eleventh Circuit Court of Appeals and the Court of Appeals affirmed this portion of the District Court's ruling, without opinion.

The Court of Appeals, unfortunately, never addressed the Petitioner's claims under Title VII and based its adverse ruling against Petitioners solely on their ADA claims. Petitioner's primary claim, however, is under Title VII, not the ADA and this claim was not specifically addressed by the Court of Appeals. The Court of Appeals, after disposing of another issue not relevant to this appeal, held: "Having resolved the Eleventh Amendment issue against Florida, we may now address the merits of Appellant's ADA claim. We affirm the dismissal of Appellant's ADA claims on the basis of the well-reasoned district court opinion."

There were two opinions, however, issued by the District Court, one on February 11, 1997 and the other on June 13, 1997. The Eleventh Circuit never addressed the Petitioner's claims under Title VII but impliedly affirmed the District Court's opinion dated June 13, 1997, regarding Petitioner's Title VII claim by its affirmance of the District Court's opinions.

In ruling only on Petitioner's ADA claim, the Eleventh Circuit ignored the primary basis of relief sought by Petitioners, that being Title VII. Title VII is the vehicle authorized by Congress for challenging employment actions motivated by the race of the employee. Petitioners presented significant evidence at the summary judgment stage below that the actions taken against them were motivated because they had beards, that they had to wear beards because of their skin condition, and that the skin condition, PFB, affects primarily black males. This evidence was ignored when the District Court held that the Petitioners could state no claim under either Title VII or the ADA. The Eleventh Circuit likewise, by implication, affirmed this holding.

SUMMARY OF THE ARGUMENT

Both the District Court and then the Eleventh Circuit Court of Appeals erred in denying Petitioners relief under both Title VII and the ADA. The issues in this case are simple and not complex and do not involve the sufficiency of evidence necessary to withstand a summary judgment motion. The issues raised in this Petition are issues of law only and involve the scope of Title VII and, less significantly, the ADA.

Petitioner Seaborn attempted to be promoted within the Department of Corrections. He was not promoted despite his qualifications. Petitioner Harris did not attempt promotions within the Department because his efforts would have been futile. Petitioner Harris, however, was terminated.

Both Petitioners claim that they are protected under Title VII and the ADA because the failure to promote these gentlemen and the hostile work environment created for them was caused by their beards, worn solely because of a skin

condition, PFB, which makes it impossible for them to shave. The Department of Corrections has a "no beard policy" with one exception, to wit: "when medically necessary." Both Petitioners maintain that they were not promoted and were otherwise treated adversely because of their beards, worn because of the PFB, which undeniably disproportionately affects black males as compared to white males.

Both the District Court and the Eleventh Circuit Court of Appeals held that these gentlemen were not protected under Title VII in their race discrimination claim nor were they protected as persons with a "disability" under the ADA. Petitioners maintain that these holdings are error and that "but for" their race, they would not have PFB. Consequently, Title VII should provide an avenue for relief. Any holding to the contrary is error.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE SCOPE OF TITLE VII AND PERSONS ENTITLED TO PROTECTION THEREUNDER

Petitioner brought this disparate treatment and disparate impact claim against the Department under Title VII[1]

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[1]The issue in this Petition is not whether the Petitioners were able to present evidence sufficient to withstand summary judgment at the District Court level. There is no question that the Petitioners presented sufficient evidence supporting their claims at the summary judgment stage. The District Court found, however, that the claim that Petitioners presented (characterized by the District Court as "beardism") was not a recognized cause of action under Title VII. Thus, at the summary judgment stage, Petitioners pointed to specific portions of the record that supported their claim which, if the District Court had found that the Petitioners were entitled to protection under Title VII, would have been sufficient to withstand summary judgment below. All of this evidence was ignored because the District Court did not find that Petitioners were entitled to protection

claiming that they were not promoted due to their race, that they were subjected to a hostile work environment due to their race and that Petitioner Harris was terminated at least in part due to his race.

The controlling facts are not complicated. Petitioners, employees or former employees of the Department, both have facial hair necessitated by a skin condition commonly known as PFB. The Department has a "no beard policy" preventing facial hair on employees unless "medically necessary." Petitioners were subjected to adverse treatment in the workplace due to their facial hair. The issue is whether Petitioners have a recognized cause of action under Title VII. This case, then, is primarily about a facially neutral employment policy that discriminates against black males when applied.

A. The Policy of the Department At Issue Has A Disparate Impact.

Title VII forbids employment policies with a disparate impact unless the policy is justified by legitimate employment goals. Griggs v. Duke Power Co., 401 U.S. 424, 429-31, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971). To make a case under Title VII for disparate impact, the aggrieved employee must identify a specific employment practice that has a significantly disparate impact. Wards Cove Packing Co. v. Atonio, 490

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under Title VII. The Court found that Petitioners had stated a claim of "beardism", which, according to the District Court, was not a protected classification under Title VII.

U.S. 642, 656-58, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989). Petitioners contend in this case that the District Court and then the Eleventh Circuit committed error in holding that the Petitioners failed to satisfy these requirements. Through the record and reliance on studies conducted on the prevalence of PFB among black and white males, the Petitioners demonstrated that the Department of Corrections policy necessarily excludes black males with PFB from promotions and creates a hostile work environment for black males with PFB. In doing so, Petitioner's have shown that the Department of Corrections facially neutral grooming requirement operates as a "built-in headwind" for black males. Griggs, 401 U.S. at 432. The records shows that PFB almost exclusively affects black males and that white males rarely suffer from PFB or a comparable skin disorder that may prevent a man from appearing clean shaven.

To establish a prima facie case of disparate impact, "a plaintiff must first identify the specific employment practice that allegedly has a disproportionate impact." Armstrong v. Flowers Hospital, Inc., 33 F. 3d 1308, 1314-15 (11th Cir. 1994). Next, the plaintiff is required to "establish causation by offering statistical evidence sufficient to show that the practice in question has resulted in prohibited discrimination." Id. "The statistical disparities must be 'sufficiently substantial that they raise[ ] an inference of causation." Id. quoting Watson v. Ft. Worth Bank and Trust, 487 U.S. 977, 995 (1988). Statistics, however, are not always required to prove disparate impact. See Thomas v. Washington County School Board, 915 F. 2d 922, 926 (4th Cir. 1990). As the court held in Thomas:

> . . . although disparate impact cases usually focus on statistics, they are neither the exclusive nor a necessary

> means of proof. The paucity of statistics is no bar to the prospective injunctive relief [plaintiff] seeks, for [plaintiff] has proved by other means that the Board's hiring practices have a disparate impact on minorities and violate Title VII. She produced evidence of at least 46 cases of nepotism, a stipulation from the Board which revealed a practice of posting vacancies in schools and offices with public notice only in exceptional circumstances, and testimony from other black applicants which indicated they were not being given an opportunity to compete for teaching jobs, largely because the Board's practices of nepotism and word-of-mouth hiring kept them unaware of job openings.

Id.

In the instant case, there are no statistics to offer because the numbers are simply too small for a statistical analysis to be performed. However, as in Thomas, Petitioners came forward with evidence that the Department's "no beard" policy, even with its exception "when medically necessary", has a disparate impact on black males with beards, namely Petitioners.

"If a "no beard" policy falls more heavily on blacks, it is no less within the ambit of Title VII than the requirement that an applicant have a diploma or pass a test, Griggs v. Duke Power Co., 401 U.S. 424 (1971), meet minimum height and weight standards, Dothard v. Rawlinson, 433 U.S. 321 (1977), or demonstrate certain lifting ability, Mitchell v. Mid-Continent Spring Co., 583 F. 2d 275 (6th Cir. 1978), cert. denied, 441 U.S. 922 (1979)." EEOC v. Greyhound Lines,

Inc., 635 F. 2d 188, 196 (3d Cir. 1980)(dissent). As the dissent stated in EEOC v. Greyhound Lines, Inc.:

> A "no beard" policy is to be treated no differently than any other employment policy, and indeed should be subjected to exacting inquiry since the skin condition it affects results from an immutable physical characteristic.

Id. at 196.

Petitioners proved that they were the only two black males who have beards who attempted to be promoted. They presented evidence to show that no black male with a beard holds a supervisory position within the Department at least at the Tallahassee, Florida, facility where they were employed. They showed that they were not being given an opportunity to realistically compete for the sought after positions simply because they had to wear beards and they produced evidence that no bearded person would ever be promoted.

The challenged practice that they identified is the "no beard policy" even with its exception for "beards when medically necessary" because this facially neutral policy is being enforced in a racially discriminatory way. The factual basis of the Petitioners claims was disclosed by evidence that established that the Department had erected barriers that "invidiously discriminate on the basis of race." Id. at 924.

The above analysis is appropriate in this non-class action case even though the numbers are relatively small because the Petitioners showed that one hundred percent of the black males with PFB employed within DOC have never been promoted. See e.g., Lasso v. Woodmen of the World,

741 F. 2d 1241 (10th Cir. 1984)(court was not persuaded that a disparate impact claim could not be asserted in a private, non-class action case and instead held that an individual plaintiff could assert a disparate impact claim under Title VII); Hung Ping Wang v. Hoffman, 694 F. 2d 1146, 1147 (9th Cir. 1982)(individual plaintiff may prevail on a disparate impact theory if he shows that the employer was using the challenged practice as a mere pretext for discrimination.)

In light of the evidence presented by the Petitioners and the holdings of the cases cited above, Plaintiffs did, in fact, establish a prima facie case of disparate impact, contrary to the holding of the trial court. In order to show disparity under a disparate impact theory, the statistical disparities must be "sufficiently substantial that they raise an inference of causation." Watson v. Ft. Worth Bank and Trust, 108 S. Ct. 2777, 2789 (1988). Here, the statistics show that 100% of a subgroup of black employees of Defendant have been adversely affected by an identified policy of the Defendant.

After this finding, the next step would be to determine whether the Department proved either that the Petitioners' statistics are inaccurate or that no disparity exists, Dothard v. Rawlinson, 433 U.S. 321, 338-39 (1977), or that the practice is necessary to the efficient operation of the business, Connecticut v. Teal, 457 U.S. 440 (1982); Fitzpatrick v. City of Atlanta, 2 F. 3d 1112 (11th Cir. 1993); Contreras v. City of Los Angeles, 656 F. 2d 1267, 1271 (9th Cir. 1981). Even after such a showing, the plaintiff "may still overcome a proffered business necessity defense by demonstrating that there exist alternative policies with lesser discriminatory effects that would be comparably as effective at serving the

employer's identified business needs." Fitzpatrick v. City of Atlanta, 2 F. 3d at 1118.

In this case, Petitioners contend that the burden never shifted back to them to show "alternative policies with lesser discriminatory effects" because the Department never established a legitimate business justification for the "no beards policy" (even with its exception). In Fitzpatrick, the Eleventh Circuit held that "once a plaintiff makes out a prima facie case, the full burden shifts to the defendant who must demonstrate business necessity in order to avoid liability." 2 F. 3d at 1117. The trial court in the instant case, however, never addressed the issue of whether the Department demonstrated business necessity in order to avoid liability because it found that the Petitioners failed to set forth a prima facie case. This holding was error even in light of the ultimate holding of the Eleventh Circuit in Fitzpatrick.[2]

Significantly, in Fitzpatrick, the court presumed that the plaintiffs had adequately alleged a prima facie case of disparate impact. Fitzpatrick, 2 F. 3d at 1118. This case supports a finding that the Petitioners in this case should have been protected under Title VII under the Eleventh Circuit's own precedent. Recall, however, that the Eleventh Circuit never addressed the Title VII liability issue in the opinion of June 16, 1998. In this action, Petitioners challenge the legitimacy of the selection system itself in that even although

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[2] The Department in this case could never come forward with the requisite showing of a "legitimate business defense" required to avoid liability because the facts to support such a defense do not exist.

beards may be worn when "medically necessary", a no beards policy is truly in effect which effects black males more frequently than other groups of applicants.[3] Under their disparate impact theory, they cannot be required to prove that

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[3] In Fitzpatrick v. City of Atlanta, 2 F. 3d at 1121, the Court noted that courts have absolved plaintiffs in certain kinds of cases (such as the present case) of responsibility for adducing evidence of their own to prove the "racially discriminatory nature of a particular policy", where the "racially discriminatory nature" of that type of policy has been consistently recognized in other decisions. The court in Fitzpatrick stated that "[r]ather than force such plaintiffs to 'reinvent the wheel,' courts have taken judicial notice of the findings made by other courts in similar cases." Id. at 1121. Petitioners in the present case requested that the trial court take judicial notice of the cases in which "no beard" policies have been discussed and found to have a disparate impact on black males with PFB. See Fitzpatrick v. City of Atlanta, 2 F. 3d 1112 (11th Cir. 1993)(business necessity found to absolve the Defendant of liability); Kennedy v. District of Columbia, 654 A. 2d 847 (D.C. App. 1994); University of Maryland, 93 Md. App. 303, 612 A. 2d 305 (Ct. App. Md. 1992); Woods v. Safeway Stores, Inc., 420 F. Supp. 35, 42 (E.D. Va. 1976); Bradley v. Pizzaco of Nebraska, Inc., 939 F. 2d 610, 613 (8th Cir. 1991); EEOC v. Trailways, Inc., 530 F. Supp. 54 (D.C. Colo. 1981); Richardson v. Quik Trip Corp., 591 F. Supp. 1151 (S.D. Iowa). There is no specific reference to the trial court's consideration of this request by Plaintiffs in the instant case.

they qualified for promotions under this system that they claim to be discriminatory unless the legitimacy of the system is first established and it is Defendant's burden to do this. See League of United Latin American Citizens v. City of Salinas Fire Dept., 654 F. 2d 557, 559 (9th Cir. 1981). The District Court never got to this issue because of its ruling that Plaintiffs failed in their prima facie showing.

Petitioners claimed in this case that the facially neutral policy of "no beards" (except when medically necessary) affected black males disproportionately and the Department offered no evidence that white males with beards were treated similarly to the Petitioners herein.[4] Likewise, the Department in this case came forward with no "business need" for the "no beard" rule. "Safety", when offered under circumstances far more compelling than in this case, has been held an insufficient reason to deny black males suffering from PFB their jobs. See Kennedy v. District of Columbia, 654 A. 2d 847, 1994 D.C. App. LEXIS 156 (D.C. App. 1994). Courts have also stressed that merely asserting a safety rationale does not suffice to prove the defense. See Fitzpatrick v. City of Atlanta, 2 F. 3d at 1119. Under a disparate impact theory of liability, even in this case where the Petitioners offer only themselves as "proof" of the existence of a discriminatory policy neutral on its face, they offered sufficient proof to

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[4] The fact that the employer has a racially balanced "bottom line" is not dispositive in a disparate impact case such as this. Title VII prohibits employment practices having disparate impact despite the employer's racially balanced "bottom line." Connecticut v. Teal, 457 U.S. 440 (1982).

withstand summary judgment. The District Court and Eleventh Circuit Court of Appeal erred in holding otherwise.

B. The Petitioners Also Set Forth a Valid Claim Under a Disparate Treatment Theory

As to the Petitioners' ability to "prove" their case with the use of circumstantial evidence under a disparate treatment theory, where the evidence is circumstantial, a plaintiff establishes intentional discrimination under a variation of the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). See also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518 (1993). Under this framework, the plaintiff must first raise an inference of discrimination by establishing a prima facie case. Batey v. Stone, 24 F. 3d 1330, 1333 (11th Cir. 1994).

Hence, the plaintiff must prove by a preponderance of the evidence in a failure to promote claim: (1) that he belongs to a protected class; (2) that he applied for and was qualified for the position for which the employer was seeking applicants; (3) that he was denied the promotion; and (4) that another equally or less qualified individual outside the protected class received the promotion.[5] Batey v. M.P.W. Stone, 24 F. 3d 1330, 1334 n. 11 (11th Cir. 1994)(citing Wu

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[5] At the trial court level, the Department did not contest that Petitioners would have been qualified for the positions sought by them and that the person or persons actually selected for the promotions were equally or less qualified than they were.

v. Thomas, 847 F. 2d 1480, 1483 (11th Cir. 1988), cert. denied, 490 U.S. 1006 (1989). In establishing the elements of a prima facie case, the plaintiff's burden is "minimal." Howard v. BP Oil Co., Inc., 32 F. 3d 520, 524 (11th Cir. 1994).

In this case, the Petitioners met their initial burden using the McDonnell Douglas framework. The Petitioners are black and, thus, are members of a group protected by the anti-discrimination laws at issue in this case. Not only are they black, but they suffer from a medical condition known as pseudo folliculitis barbae Courts have generally recognized that this condition disproportionately affects black males and black males with this condition have therefore been recognized as being included within a protected class. See e.g., Fitzpatrick v. City of Atlanta, 2 F. 3d 1112 (11th Cir. 1993); EEOC v. Greyhound, 635 F. 2d 188 (3d Cir. 1980).

Additionally, Petitioners were not hired for the positions sought by them and no bearded person was so hired nor has any black bearded person within the Department ever been promoted. It should have been irrelevant in this proceeding that a black person received one position sought by Petitioner Seaborn because the person who received the position, a black female, is still outside of the Petitioners' protected class, i.e., black and "bearded". At the District Court level, the Department of Corrections did not contest that the Petitioners were at least as qualified as the persons who received the positions sought by the Petitioners. See Hill v. Seaboard Coast Line R.R. Co., 885 F. 2d 804, 809-810 (11th Cir. 1989)(holding that "[a] plaintiff may establish a prima facie case even if he shows that the non-minority employee selected was equally as well qualified; he need not show, as part of his prima facie case, that his qualifications exceeded those of the non-minority employee").

After the Petitioners' prima facie obligations have been satisfied, the burden then shifts to the defendant to "articulate some legitimate nondiscriminatory reason" for its decision not to promote the Petitioners. McDonnell Douglas, 411 U.S. at 802. The defendant's burden is "exceedingly light," Perryman v. Johnson Products Co., Inc., 698 F. 2d 1138, 1142 (11th Cir. 1983), as it "must merely proffer [race-neutral] reasons, not prove them." Meeks v. Computer Assocs. Int'l, 15 F. 3d 1013, 1019 (11th Cir. 1994). The proffered reason for the employer's action, however, must be reasonably specific and clear. McDonnell Douglas, 450 U.S. at 258.

In the present case, there were no reasons proffered by the Department to show why Seaborn did not receive the promotions sought by him. Thus, there should have been no further obligation for Seaborn since the Department failed in its burden of production. See Clark vs. Coats & Clark, Inc., 929 F. 2d 604, 608 (11th Cir. 1991)(if the party moving for summary judgment, however, fails to discharge its initial burden, then the motion must be denied and the court need not consider what, if any, showing the non-movant has made.)

With respect to Petitioner Harris (presuming that the Department met its burden of production), the McDonnell Douglas framework, with its presumptions and burdens, drops out of the case, and the inquiry should have become "whether [the] plaintiff has proven 'that the employer intentionally discriminated against' him because of his race." St. Mary's Honor Center v. Hicks, 113 U.S. 2742, 2747 (1993). In other words, at this stage, the plaintiff's burden of proving pretext merges with the plaintiff's ultimate burden of proof of intentional discrimination. McDonnell Douglas, 450 U.S. at 256.

Petitioners advanced three arguments before the District Court supporting their position that the Department alleged proffered explanation was pretextual. First, they showed that they were qualified for the promotional positions. Second, they identified the discriminatory statements and an attitude of Defendant's employees toward them. Third, they presented evidence regarding Defendant's promotion practices and showed these practices to be discriminatory toward black males with beards (worn solely because of their skin condition, PFB). This evidence would have allowed a reasonable jury to find a discriminatory animus that was a "motivating factor" in Defendant's decision not to promote the Petitioners. See 42 U.S.C. §2000e-2(m). Petitioners thus presented credible evidence that Mr. Seaborn should have received a promotion and that "but for" his beard, this position would have been his.

With respect to Petitioner Harris, he showed the trial court through both circumstantial and direct[6] evidence that he did not apply for promotions because he knew that he would

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[6] A plaintiff alleging disparate treatment may prove a prima facie case either through direct evidence of discrimination or with circumstantial evidence. Burns v. Gadsden State Comm. College, 908 F. 2d 1512, 1517-18 (11th Cir. 1990). Considering this strict standard, Petitioners submit that direct evidence offered by them was sufficient to meet their prima facie burden. However, they presented both the direct and circumstantial evidence at the District Court level in the event that the direct evidence was discounted or held insufficient to meet the "direct" evidence standard.

not be promoted because of his beard. He then argued that he was not required to engage in an act of futility in applying for positions that he knew and that history showed he would not get. See International Brotherhood of Teamsters vs. United States, 97 S.Ct. 1843, 1871-72 (1977); James vs. Stockham Valves & Fittings Co., 559 F.2d 310, 334 (5th Cir. 1977); Taylor v. Hudson Pulp and Paper Corp., 788 F.2d 1455 (11th Cir. 1986).

With this and other evidence of record at the time summary judgment was granted, the trial court should have been convinced that Petitioners' beards, worn due to a feature primarily affecting black males, and thus race, was left as the motivating explanation for the failure of Defendant to promote Petitioners. There was also ample trustworthy evidence in the record in this case that the Department treated Petitioners differently than white and non-bearded employees. Unambiguous statements were made about the Petitioners not being promoted due to their beards. By analogy, "unambiguous racial epithets, particularly when uttered by an employee's supervisor 'automatically separate[]'" a black employee from every non-black employee. Bailey v. Binyon, 583 F. Supp. 923, 927 (N.D. Ill. 1984). The comments about Petitioners' beards, located throughout the record in this case, when combined with the other evidence of non-promotion recited above, constituted strong circumstantial evidence from which an inference of blatant, open racial discrimination should have been drawn. In light of this evidence, any purported race-neutral reasons for the non-promotion became transparent and revealed underneath a racial animosity.

Significantly, there were no other facts that could have been brought forward by the Petitioners because no other facts existed. The facts that were presented, however, should have

been convincing that a disputed issue of material fact existed and would have been sufficient had the District Court and Eleventh Circuit correctly interpreted the law under Title VII and held that the Petitioners had a recognized cause of action thereunder. Petitioners maintain that the record evidence would have been sufficient to defeat the Department's Motion for Summary Judgment but were deemed insufficient by the District Judge solely because he rejected the Petitioners' theory of liability. In other words, if the District Court had not rejected the Petitioners theory of liability under Title VII, the facts would have been sufficient under any standard of review for summary judgment. The Petitioners, however, could never have satisfied any standard, stringent or relaxed, due to the fact that the District Court rejected their theory of liability. Petitioners never could have won regardless of the "facts" because the court decided that they were bringing a case of "beard-ism" rather than "racism". Petitioners therefore contend that this case will turn on whether this Court recognizes a cause of action under Title VII due to differential treatment of black males due to their race-based skin condition, PFB.[7]

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[7] In footnote 3 of the District Court's June 13, 1997, Order, the Court referred to Plaintiffs' "winding theory of the case in order to arrive at a conclusion that, under the facts as presented here, beard discrimination and race discrimination are one in the same." The six (6) points set forth in this footnote are precisely the argument made by the Petitioners in this Petition and support a cause of action under Title VII. These six points are as follows:

1. Plaintiffs were not promoted because they have beards;

The District Court held that because other African Americans were chosen as the successful applicants for two of the promotions sought by Mr. Seaborn, "logic dictates that there is a reason other than the plaintiffs' race that they did not receive the promotions they desired. In this case, that reason is patently clear: Plaintiffs wear beards." The court then stated that because black employees applied for and received half of the promotions sought by Mr. Seaborn, "[c]learly, then, race was not the factor that motivated Defendant to promote persons other than Seaborn."

With respect to Plaintiff Harris, the District Court held that he "never even submitted one application for promotion." The trial court then stated:

> "And while Harris argues that it would have been futile for him to submit an application for a job given comments made to him by supervisory employees of Defendant, it is significant to note his explanation for that futility. Harris does not suggest that his race would have rendered useless his ability to advance;

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2. Plaintiffs have beards because their doctors instructed them to grow beards;

3. Plaintiffs doctors instructed them to grow beards because they have a skin condition known as *pseudo folliculitis barbae* ("PFB");

4. PFB predominately affects blacks;

5. Accordingly, Plaintiffs suffer from PFB because they are black; and

6. Hence, Plaintiff are forced to have beards because they are black.

> instead, he states that he 'did not apply for promotions because he knew that he would not be promoted **because of his beard."** (emphasis in original)

The District Court again refused to accept a claim by Mr. Harris that he has a beard due to his skin condition, PFB, which effects black males in much greater numbers than it effects white males. This is a claim made based on race and is not based on the fact that Harris had a beard alone. The beard is secondary to being black but, generally, if one has PFB, he is black.

C. Petitioners Offered Sufficient Evidence to Support a Hostile Work Environment Claim

With respect to the Petitioners' hostile work environment claim, the District Court found the evidence offered by the Petitioners so deficient that no claim could be stated under this theory. The reason for this deficiency, however, was not the paucity of evidence to support the hostile work environment claim, but rather the District Court's refusal to find that the actions against the Petitioners were due to any recognized theory of liability.

Discriminatory conduct results in a hostile work environment when it is "so severe or pervasive that it create[s] a work environment abusive to employees because of their race, gender, religion or national origin," thus, offending "Title VII's broad rule of workplace equality." Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993). To prevail on a hostile work environment claim, the plaintiff must establish that: (1) he belongs to a protected class; (2) he was subjected to

unwelcome racial harassment; (3) the harassment was based on race; and (4) the harassment affected a term, condition or privilege of employment. Henson v. City of Dundee, 682 F. 2d 897, 903-05 (11th Cir. 1982); Ellis v. Wal-Mart Stores, Inc., 1996 U.S. Dist. LEXIS 20194 (M.D. Ala. 1996).

The trial court found that the Petitioners failed to satisfy the third prong of this four part prima facie test because, as the court stated, "the full record demonstrates that the alleged harassment to which Plaintiffs were subjected was based on their beards, not their race." Petitioners both agree and disagree. Their claim is based on their beards and their race, together.

In this case, the Petitioners set forth ample facts to show that the comments about them were not infrequent but were common place and were directed towards them due to their beards and their race, not either factor by itself. As with the disparate treatment claims by Petitioners, had the District Court accepted their theory of liability and found that they were in a protected class under Title VII, the District Court's ruling on Petitioners' " hostile work environment claim" as with their disparate impact and treatment claims, most likely would have been different. As it stands under the District Court's Order of June 13, 1997 and the Eleventh Circuit's Opinion, Petitioners evidence of illegal activities under Title VII was rejected because Petitioners have no recognized claims, according to the Orders from the District Court, affirmed by the Eleventh Circuit, under Title VII. Not surprisingly, the District Court rejected Petitioners' hostile work environment claim finding that there were only a few comments made about the Petitioners race. Plaintiffs do not disagree with the finding by the trial court that there is little evidence to support a hostile work environment claim if it is

based solely on the race. In this case, however, but for their race, the Petitioners most likely would not have had PFB and this makes their race and their beards inseparable. It was error for the District Court and Eleventh Circuit Court of Appeals to reject the evidence offered by the Petitioners in support of their hostile environment claim because of the courts' rejection of their theory of the case.

The Petition should be granted so that the Court may affirm the importance of its longstanding holdings of the scope of Title VII and protections afforded to aggrieved persons affected by adverse employment actions motivated by race and affirm that the Petitioners, black males suffering from PFB, are protected under Title VII.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE INTENDED SCOPE OF 42 U.S.C. §12101 ET SEQ., AS A PROTECTION FOR PERSONS WITH DISABILITIES SUCH AS THE PETITIONERS

Petitioners bear the initial burden of demonstrating a prima facie case of disability discrimination under the Americans with Disabilities Act (ADA), codified at 42 U.S.C. §12101 et seq. A prima facie case under the ADA requires a showing of the following: (1) that the plaintiff is disabled pursuant to the dictates of the ADA; (2) that with or without reasonable accommodations he can perform the essential functions of the position in question; and (3) that he has been discriminated against because of his disability. Terrell v.

USAir, 132 F. 3d 621, 624 (11th Cir. 1998); Harris v. H & W Contracting, Co., 102 F. 3d 516, 519 (11th Cir. 1996); 42 U.S.C. §12132.

A qualified individual with a disability may establish unlawful discrimination by showing that he was not provided reasonable accommodation (unless the accommodation would have posed an undue hardship on the employer) and/or that he was subjected to an adverse personnel action because of his disability. See e.g., Jackson v. Veterans Admin., 22 F. 3d 277 (11th Cir. 1994). In addition, the law recognizes harassment as a form of discrimination when that harassment creates a hostile work environment. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).

Plaintiffs have met their burden in all respects in proving a prima facie case of discrimination on one or more of these theories of liability as shown below. The District Court and Eleventh Circuit, however, rejected Petitioners claim under the ADA holding that they are not disabled under the law. Petitioners claim that these holdings are error.

The ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a). Under the ADA, a "disability" is (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or © being regarded as having such an impairment. 42 U.S.C. §12102(2). The ADA does not define such terms as "physical or mental impairment," "major life

activity," or "substantially limits." Instead, these definitions are found in the regulations Congress directed the EEOC to issue to implement the statute. See 42 U.S.C. §12116 (providing EEOC with authority to issue implementing regulations); 29 C.F.R. Pt. 1630, Appendix to Part 1630 -- Interpretive Guidance to Title I of the ADA.

Under the EEOC regulations, "physical impairment" is defined as "any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine." 29 C.F.R. §1630.2(h)(1). "Major life activities" include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1614.203(a)(3). If a plaintiff's alleged impairment does not substantially limit a major life activity, he is not disabled and cannot recover under either the ADA. The regulation further states:

> "If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." 29 C.F.R. §1630, App., §1630.2(j).
>
> * * *
>
> With respect to the major life activity of working, the term substantially limits means significantly restricted

> in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. 29 C.F.R. §1630.2(J)(3).

It is not disputed in this case that the Petitioners are restricted from being promoted within the Department of Corrections. Thus, it cannot be disputed that they are unably to perform one or more job classifications due to the fact that they wear beards, worn because of their skin condition, PFB.

In a case similar to this case, Fitzpatrick v. City of Atlanta, 2 F. 3d 1112 (11th Cir. 1993), the Eleventh Circuit held that certain black male firefighters employed with the City of Atlanta were protected under the Rehabilitation Act even though the City of Atlanta was successful in proving there was no reasonable accommodation by which the firefighters with PFB would be able to perform their jobs safely without being clean-shaven. This defense does not apply in this case and the Eleventh Circuit had to reject an ADA analysis similar to the analysis accepted in Fitzpatrick under the Rehabilitation Act in order to find no liability in this case under the ADA.

The District Court and then the Eleventh Circuit Court of Appeals erred in granting summary as to Plaintiff's ADA claim and in rejecting the ruling of this Court in Fitzpatrick v. City of Atlanta, 2 F. 3d 1112. Significantly, courts have universally looked to Rehabilitation Act cases as a source of guidance when construing the ADA. McKay v. Toyota Motor Mfg. U.S.A., Inc., 110 F. 3d 369, 373 n. 1 (6th Cir 1997); Duckett v. Dunlop Tire Corp., 120 F. 3d 1222 (11th Cir.

1997). Because the Petitioners were restricted in performing an entire class of positions within DOC and were restricted from promotions of any type, their claims under the ADA should have been recognized and accepted as valid.

In order to establish a prima facie case of disability discrimination based on differential treatment, a plaintiff must show that he is a member of a protected class and that the defendant took adverse action against him in circumstances that raise an inference of unlawful discrimination. See Rio v. Runyon, 972 F. Supp. 1446, 1458 (S.D. Fla. 1997).

In this case, Petitioners are member of a protected class because of their skin condition. Second, they have brought forward evidence that raises an inference of unlawful discrimination by showing that the Department failed to hire them into upper level positions and/or fired Harris because of a skin condition. They have also shown that the Department's upper level personnel denied Mr. Seaborn's requests for promotion because of his beard, worn because of his PFB.

As for proving that they were subjected to adverse action, Mr. Harris was fired. Mr. Seaborn was refused promotions and was consequently in a dead end position with no prospect for advancement. These actions constitute adverse employment action. 29 C.F.R. §1630.5 (forbidding employers from limiting, segregating, or classifying an employee "in a way that adversely affects his or her employment opportunities);. see also Collins v. State of Illinois, 830 F. 2d 692, 702-704 (7th Cir. 1987); see generally Harris v. H & W Contracting Co., 102 F. 3d 516, 523-24 (11th Cir. 1996)(discussing adverse employment action in the ADA context).

Because Petitioners fell within the group of persons entitled to protection under the ADA, by rejecting the Petitioner's claims thereunder, the Court of Appeals denied Petitioners a viable claim for relief from unlawful employment practices.

CONCLUSION

This case presents several questions of exceptional importance -- whether black litigants suffering from PFB are entitled to protection under Title VII and/or the ADA. In the opinion of the District Court and Eleventh Circuit Court of Appeals are allowed to stand, black males suffering from PFB who are subjected to adverse employment action and subjected to hostile work environments due to the fact that they are forced to wear beards because of their skin conditions will be prevented from maintaining a cause of action under both Title VII and the ADA. By granting the Petition for certiorari, however, this Court can correct the Eleventh Circuit's decision, which defies logic and defies not only this Court's established precedent but the intent of Title VII and the ADA. In so doing, this Court can also reaffirm the scope of persons protected by these laws and reaffirm the important role of these laws in effectuating race and disability discrimination in the workplace.

Accordingly, Mr. Seaborn and Mr. Harris respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DATED FILED JUNE 16, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2855

D. C. Docket No. 4:96cv168 MMP

CHARLES SEABORN,
ROBERT HARRIS,
Plaintiffs-Appellants,

versus

STATE OF FLORIDA,
DEPARTMENT OF CORRECTIONS,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(June 16, 1998)

Before COX and BLACK, Circuit Judges, and RONEY, Senior Circuit Judge.

BLACK. Circuit Judge:

Appellants Charles Seaborn and Robert Harris brought this action against the State of Florida, Department of Corrections (Florida), alleging they were discriminated against in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (ADA). The district court granted Florida's motion for summary judgment and Appellants filed this appeal. Florida now asserts for the first time that it is entitled to Eleventh Amendment sovereign immunity from Appellants' ADA claims.

I. BACKGROUND

Appellants are African-American males who worked for Florida at the Tallahassee Community Correctional Center (TCCC). Appellants have a skin condition known as *pseudo folliculitis barbae* (PFB), which causes lesions to form on the surface of their skin after shaving. Appellants allege that the appropriate treatment for PFB is simply to refrain from shaving and, therefore, that they must wear beards as a matter of medical necessity.

TCCC has a "No Beard Policy" requiring male employees to be clean-shaven. This policy includes medical exceptions under which TCCC permitted

Appellants to wear beards. Appellants allege they nevertheless were subjected to de facto workplace discrimination and were denied promotions because they wore beards. Appellants brought claims against Florida pursuant to the ADA, asserting that PFB is a disability. The district court granted Florida's motion for summary judgment, concluding that Appellants do not have a disability within the meaning of the ADA because PFB does not substantially limit Appellants' ability to work.[8] This appeal followed.

II. DISCUSSION

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[8] Appellants also brought claims alleging they were discriminated against on the basis of race in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17. Florida filed a motion for summary judgment on all claims. In its order dismissing the ADA claims, the district court reserved judgment on the Title VII claims and instructed Appellants' counsel to clarify the theory of Title VII liability and to specify the record evidence demonstrating a genuine issue of material fact. After further briefing, the district court dismissed the Title VII claims, ruling that Appellants had not stated a prima facie case of discrimination under any theory of Title VII liability. Appellants appeal the district court's order dismissing the Title VII claims. We affirm the dismissal of the Title VII claims on the basis of the well-reasoned district court opinion.

Florida asserts for the first time on appeal that it is entitled to Eleventh Amendment immunity from Appellants' ADA claims. An assertion of Eleventh Amendment immunity essentially challenges a court's subject matter jurisdiction: "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed on federal jurisdiction." *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73, 116 S. Ct. 1114, 1131-32 (1996). Eleventh Amendment immunity therefore may be asserted for the first time on appeal. *Smith v. Avino*, 91 F.3d 105, 107 (11th Cir. 1996)-(citations omitted), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't.* _U.S._.
118 S. Ct. 1003 (1998). Furthermore, an assertion of Eleventh Amendment immunity must be resolved before a court may address the merits of the underlying claim(s). *See Steel,* _ U.S. at _, 118 S. Ct. at 1012-16.[9]

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[9] Despite the jurisdictional nature of the Eleventh Amendment, prior to *Steel* this Court held that an assertion of sovereign immunity could be ignored where the resolution of the merits of a claim would favor the party asserting sovereign immunity:

> Though it is the usual practice to resolve subject matter jurisdictional issues before reaching the merits, it is permissible for the Court to bypass jurisdictional questions and

Florida is entitled to Eleventh Amendment immunity unless Congress has abrogated that immunity. "In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power." *Seminole Tribe*, 517 U.S. at 55, 116 S. Ct. at 1123. Congress has unequivocally expressed its intent for the ADA to abrogate sovereign immunity. 42 U.S.C. § 12202. Therefore, our analysis will focus on the second question set forth in *Seminole Tribe*.

> decide the case on the merits when the jurisdictional issue is difficult, the law is not well-established, and a decision on the merits favors the party who has raised the jurisdictional bar.

Smith, 91 F.3d at 108. This practice was referred to as "hypothetical jurisdiction," whereby the court hypothetically assumed jurisdiction over a case and then dismissed the case on the merits. The Supreme Court squarely rejected the doctrine of hypothetical jurisdiction in *Steel* and instructed that a challenge to Article III subject matter jurisdiction must be resolved before a court may address the merits of the underlying claim in any manner. *Steel*, _ U.S. at _, 118 S. Ct. at 1012-16.

In *Kimel v. State Bd. of Regents*, 139 F.3d 1426. 1433 (11th Cir. 1998), a panel of this Court held that the ADA is a valid exercise of the Enforcement Clause of the Fourteenth Amendment and concluded that the States do not have Eleventh Amendment immunity from claims brought under the ADA. *Id.* We are bound by the decision of the *Kimel* panel unless that decision is overruled by the Supreme Court or by this Court sitting en banc. *United States v. Woodward*, 938 F.2d 1255, 1258 (11th Cir. 1991).

Having resolved the Eleventh Amendment issue against Florida, we may now address the merits of Appellants' ADA claims. We affirm the dismissal of Appellants' ADA claims on the basis of the well-reasoned district court opinion.

AFFIRMED.

APPENDIX B

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA AT TALLAHASSEE, FLORIDA.

DECIDED FEBRUARY 11, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CHARLES SEABORN,
and ROBERT HARRIS,

Plaintiffs,

v. CASE NO. 4:96cv168-MP

STATE OF FLORIDA,
DEPARTMENT OF CORRECTIONS,

Defendant.

_____/

ORDER

This matter is before the Court on Defendant's Motion for Summary Judgment (doc. 49). Plaintiffs filed

a response thereto (doc. 61). For the reasons explained below, the motion is GRANTED IN PART; the remainder is HELD IN ABEYANCE pending further submissions to the Court in accordance with this order.

BACKGROUND:

Plaintiff Seaborn and Plaintiff Harris are bearded men who worked for Defendant State of Florida, Department of Corrections ("DOC"), at the Tallahassee Community Correctional Center ("TCCC") during the late 1980s and early 1990s. Plaintiff Seaborn worked at TCCC from May 1989 until July 1993, at which point he was transferred to another institution within the Florida prison system. Plaintiff Harris worked at TCCC from May 1987 until his termination in October of 1993.

Throughout Plaintiff's employment, TCCC maintained an employment policy which required correctional employees to come to work *sans* facial hair. See § 33-4.002 (4) (d), Fla. Admin. Code ("The face [of a male employee] will be clean-shaven other than the wearing of an acceptable moustache or sideburns. Beards and goatees are prohibited."). The DOC's policy, however, allowed for medical exceptions to the no-beard rule. See id. at (g) ("The only exception to the grooming policy shall be based on medical need. ***Facial hair in cases of exemption shall be neatly trimmed to 1/8 inch.")

Both of the plaintiffs in this action suffer from a skin abnormality known as *pseudo folliculitis barbae*[1] ("PFB"). See *Affidavit of Plaintiff, Charles Seaborn* (Doc. 62, Exhibit A) ("Seaborn Affidavit") at ¶3; *Affidavit of Plaintiff, Robert Harris* (Doc. 62, Exhibit B) ("Harris Affidavit") at ¶3. Based on this medical condition, both were advised by their physicians that they should not shave. *Seaborn Affidavit* at ¶4; *Harris Affidavit* at ¶4. Each plaintiff produced medical documentation which indicated that he fell within the medical exception to the no-beard policy[2], and each was thereafter permitted by

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[1] This condition is described as "a bacterial disorder, usually caused by *Staphylococcus aureus*, occurring chiefly in the beard of blacks, especially in the submandibular region of the neck, the characteristic lesions being erythematous papules, sometimes pustules, containing buried hairs whose tips can easily be freed up; in contrast to sycosis barbae, which is most often seen in bearded men, pseudo folliculitis affects exclusively those who shave." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1378 (27th ed. 1988)

[2] Plaintiffs state that "treatment [for PFB] consists predominantly of refraining from shaving; therefore, as a result of my condition, I am unable to shave." *Seaborn Affidavit* at ¶3; see, also, *Harris Affidavit* at ¶3.

Defendant to come to work with a so-called "shadow" beard.

Notwithstanding the medical documentation of their PFB conditions, and notwithstanding Defendant's subsequent exemption of Plaintiffs from the shaving policy, Plaintiffs claim that they were discriminated against at work because they wore beards. As they have phrased it in their affidavits, once they began showing up for work without shaving, they were "treated differently from and disparately in relation to...[their] co-workers." *Seaborn Affidavit* at ¶4; see *Harris Affidavit* at ¶4. Specifically, the Plaintiffs explain that each was told -- on separate occasions -- by his supervisors that he was not "supervisory material," and hence would never be promoted, as long as he had a beard. *Seaborn Affidavit* at ¶10 (S); *Harris Affidavit* at ¶6.

This complaint, of course, is not based on Plaintiffs' allegations of invidious "beard-ism". Rather, the case is more complex and more subtle than that.

Plaintiffs are both African Americans -- African Americans diagnosed with PFB. As Plaintiffs have stated in their affidavits, PFB is "common and exclusive to black males." *Seaborn Affidavit* at ¶3; *Harris Affidavit* at ¶3.[3] As

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[3] Though Plaintiffs have come forward with no expert medical testimony to augment either of their bare assertions (i.e., that

PFB is "common" among African Americans, and that PFB is "exclusive to black males") the Court -- for purposes of this motion -- takes judicial notice of these medical realities. It is appropriate for this Court to do so because these facts are not subject to reasonable dispute and they are capable of accurate and ready determination by resort to sources, such as the medical dictionary cited at footnote one, whose accuracy cannot reasonably be questioned. See Fed.R.Evid. 201(b) (2); Harris v. H&W Contracting Co., 102 F.3d 516, 522 (11th Cir. 1996) (taking judicial notice of fact that Graves' disease is a condition that has capability of substantially limiting major life activities).

In addition, other federal courts -- including the Eleventh Circuit Court of Appeals -- who have published opinions pertaining to PFB have recognized that the disease is common, see Richardson v. Quik Trip Corp., 591 F. Supp. 1151, 1155 (S.D. Iowa 1984) (noting that between 45 and 83 percent of all black males suffer from PFB), and EEOC v. Trailways, Inc., 530 F. Supp. 54, 56 (D. Colo. 1981) (quoting scientific evidence showing that 50 percent of all black males suffer from PFB), and showing that it affects black men almost exclusively, see id. (quoting expert witness who testified that he has "never seen a severe case of PFB in anyone other than a black

a result of their PFB, the plaintiffs are unable to shave. Plaintiffs allege that their beards are thus worn as the direct result of a "medical condition," see *Seaborn Affidavit* at ¶3 and *Harris Affidavit* at ¶3 -- or, as they have alternatively described it, a "disability (PFB)". *Seaborn Affidavit* at ¶5; *Harris Affidavit* at ¶5. Their complaint concludes, therefore, that what may otherwise be viewed merely as non-actionable "beard-ism" is, under the facts of this case, discrimination on the basis of a disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.* Moreover, due to the fact that PFB is a medical condition which disproportionately affects African Americans, Plaintiffs further conclude that the adverse employment actions to which they have been subjected amount to discriminatory treatment on the basis of race in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*

ANALYSIS:

In its motion, Defendant moves for summary judgment on all of Plaintiffs' claims. Thus, Defendant argues that it is entitled to summary judgment on the portions of Plaintiffs' complaint brought pursuant to the ADA, as well as those portions brought under Title VII. The Court will analyze each of these arguments in turn.

[man]"). See, also, Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1114 (11th Cir. 1993) ("It is generally recognized that PFB disproportionately afflicts African-American men.").

(a) Summary Judgment Standard

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c); see Southern Solvents, Inc. v. New Hampshire Ins. Co., 91 F.3d 102, 104 (11th Cir. 1996). The Court must grant a motion for summary judgment unless the party opposing the motion produces evidence from which a "fair minded jury could return a verdict" in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

The moving party bears the burden of showing that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Southern Solvents, Inc., 91 F.3d at 104. Rule 56 (e) requires the non-moving party to go beyond the allegations raised in the pleadings; by affidavits, deposition testimony, and the like, the non-moving party must designate specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56 (e); Celotex, 477 U.S. at 324. Because the movant bears the burden of proof, however, the district court typically resolves all reasonable doubts about facts in favor of the non-movant and draws all justifiable inferences from the underlying facts in the non-movant's favor. McCabe v. Sharrett, 12 F.3d 1558, 1560 (11th Cir. 1994); Anderson, 477 U.S. at 255.

(b) The Americans with Disabilities Act

As a panel of the Eleventh Circuit Court of Appeals has recently observed, Congress enacted the ADA to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. Harris, 102 F.3d at 519 (quoting 42 U.S.C.A. § 12101 (b) (1)). While the Act should therefore be broadly construed to protect persons with disabilities, Kornblau v. Dade County, 86 F.3d 193, 194 (11th Cir. 1996), it should not be viewed as a means of giving disabled persons an unfair advantage over non-disabled persons, id., nor should its mandate be garbled and strained in an effort to create legal entitlements for individuals who are not truly "disabled". See Patrick v. Southern Co. Services, 910 F. Supp. 566, 567 (N.D.Ala. 1996) (observing that the "initial story of the ADA has been the attempt of persons to stretch the intent of the ADA with regard to alleged 'disabilities'"), affirmed 103 F.3d 149 (11th Cir. 1996) (table decision). Establishing that one is disabled is therefore the cornerstone to an ADA plaintiff's prima facie case. Fussell v. Georgia Ports Authority, 906 F. Supp. 1561, 1567 (S.D.Ga. 1995), affirmed -- F.3d -- (11th Cir. 1997) (unpublished table decision).

In order to state a prima facie case of disability discrimination under the ADA, Plaintiffs must

demonstrate that: (1) they have a "disability"[4]; (2) their employer had either actual or constructive knowledge of that "disability"; (3) they were qualified for the position that was denied to them; and (4) they were subjected to unlawful discrimination as a result of their "disability". Gordon v. Hamm & Associates, Inc., 100 F.3d 907, 910 (11th Cir. 1996); Morisky v. Broward County, 80 F.3d 445, 447 (11th Cir. 1996). Because Plaintiffs are unable to show that they are "disabled" under the definition which this Court must apply to their ADA claim, they therefore have failed to state a prima facie case under the statute; Defendant is thus entitled to summary judgment.

In the ADA, Congress has defined "disability" as either: (1) a physical or mental impairment that substantially limits the major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such impairment. 42 U.S.C. § 12102 (2); Pritchard v. Southern Co. Services, 92 F.3d 1130, 1132 (11th Cir.), amended in part by 102 F.3d 1118 (11th Cir. 1996). The text of the ADA, however, does not define "impairment"; thus, this Court looks to regulations promulgated by the Equal Employment Opportunity Commission for the definition of that term. See 42 U.S.C. § 12116 (authorizing EEOC to issue implementing regulations for the ADA).

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[4] The term "disability" is placed in quotes here to denote that it is a legal term of art with a precise definition under the ADA.

Under the EEOC regulations, the definition of "physical impairment" includes "[a]ny physiological disorder or condition, or cosmetic disfigurement . . . affecting. . . [the] skin. . .." 29 C.F.R. § 1630.2 (h) (1). The Court therefore finds -- and the parties are in accord -- that the Plaintiffs' PFB constitutes a physical impairment for purposes of the ADA.

A physical impairment, standing alone, however, is not necessarily a "disability" as contemplated by the ADA. Gordon, 100 F.3d at 911. That is because the ADA indicates that for an impairment to constitute a qualifying "disability" under the statute, the impairment must "substantially limit one or more of the major life activities" of the plaintiff. 42 U.S.C. § 12102 (2) (A).

The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment that the person has; rather, it is based on the specific effect of that impairment on the individual's life. Pritchard, 92 F.3d at 1332 n.3 (quoting 29 C.F.R. § 1630.2(j) (App.)). To determine that specific effect, the Court must explore whether the plaintiff's alleged impairment affects a "major life activity," and whether it causes a "substantial limitation" on the plaintiff's ability to engage in that activity. See, e.g., Freund v. Lockheed Missiles and Space Co., Inc., 930 F.Supp. 613, 617 (S.D.Ga. 1996). For a "mere degradation" in the plaintiff's ability to perform a major life activity does not transform a simple impairment into an ADA-qualifying disability, id.; instead, in order to

trigger application of the ADA, a *substantial* limitation on the activity must come as a direct result of the plaintiff's impairment.

For purposes of the statute, "major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning and working." 29 C.F.R. § 1630.2(I). If the Plaintiffs' alleged impairment cannot be said to affect one of these delineated activities, or an analogous activity, the Plaintiffs are not "disabled" and thus cannot recover under the ADA. See Desai v. Tire Kingdom, Inc., 944 F.Supp. 876, 879 (M.D.Fla. 1966).

It is Plaintiffs' contention that their PFB condition hinders their ability to participate in the major life activity of working.[5] See *Plaintiffs, Charles Seaborn's* and *Robert Harris', Response in Opposition to Motion for Summary Judgment* (doc. 61) at 5-6. As their attorney frames the argument:

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[5] Plaintiffs make no argument that PFB prevents them from caring for themselves, performing manual tasks, walking, seeing, hearing, breathing, or learning. Thus, their ADA cause of action rests exclusively on a claim that PFB precludes their participation in the major life activity of working.

> In this case, if Plaintiffs worked someplace other than the Department of Corrections, they may not be considered disabled. But, because of the no beard policy and the fact that the persons in control of the facilities where Plaintiffs worked disfavored beards and more or less "held them against" the black males with beards, because of their medical condition, they were not able to engage in one of life's major activities, i.e., continuation of gainful and productive employment which necessarily includes promotions.

Id. Unfortunately for her clients, this position which Plaintiffs' counsel advances is uninformed and without basis in ADA jurisprudence.

The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. 29 C.F.R. § 1630 2 (j) (3); Pritchard, 92 F.3d at 1133. To demonstrate that an impairment "substantially limits" the major life activity of working, an individual must show significant restrictions in the ability to perform either a *class* of jobs or a *broad range* of jobs in various classes. 29 C.F.R. § 1630.2 (j) (3); Gordon, 100 F.3d at 912 (emphasis added).

Here, Plaintiffs' disability argument is entirely dependent on the interaction between their impairment --

PFB -- and a specific employment policy which exists at the DOC. Plaintiffs are not physically impaired from performing any tasks which they have been asked to accomplish at work.[6] In fact, Plaintiffs testified at deposition that PFB does not interfere with their work at TCCC, or limit their activities at that facility, in any way. *Deposition of Charles Seaborn* at 129; *Deposition of Robert Harris* at 75-77. Hence, Plaintiffs' own admissions indicate that they are not "disabled" individuals entitled to the protection of the ADA. See Weaver v. Florida Power & Light, 1996 WL 479117, *5 (S.D.Fla. 1996).

Moreover, there is nothing in the record to indicate that PFB restricted Plaintiffs' job or advancement opportunities with other employers in the greater Tallahassee geographic area. Such a showing must be made by one who brings an ADA claim based on a limitation on his ability to work. See 29 C.F.R. 1630 (j) (3) (ii).

What is indicated by this record is that Plaintiffs merely cannot work for a particular defendant, in a particular position. That is not enough to get Plaintiffs'

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[6] Plaintiffs are, of course, unable to shave their faces. Shaving one's face, however, does not amount to a major life activity. Cf. 29 C.F.R. § 1630.2 (j) (3).

ADA cause of action before a jury. Patrick, 910 F.Supp. at 569-70. To establish a disability under the ADA, a plaintiff must demonstrate that he has an impairment that substantially limits employment generally. Id. Plaintiffs have not made that demonstration here.

Judge Propst has written that it is axiomatic that before a plaintiff can maintain an ADA claim he must offer substantial evidence that he is disabled. Id. This, of course, is a plainly tautological commentary on the statute; namely, only an individual with a disability can successfully sue under the Americans with *Disabilities* Act. For that reason, one might therefore suppose that Judge Propst's insight is unnecessary. Surprisingly, it is not.

This case, like a great many of the reported ADA cases, exemplifies that plaintiffs who attempt to invoke the ADA often mischaracterize their particular physical impairments as qualifying "disabilities". Unfortunately for Plaintiffs, "disability" is a term of art under the act, and it is a term whose statutory definition does not stretch so far as to encompass the impairment affecting Plaintiffs' skin. While they may (or, for that matter, may not) consider themselves disabled as the term is frequently used, Congress enacted a statute which offers narrower relief to a more seriously deprived class of persons. See Quinley v. State Farm Ins. Corp., 1996 WL 544258, *8 (S.D.Ala. 1996). Hence, while Plaintiffs may well have a physical impairment, they have not persuaded this Court

that the impairment substantially limited their ability to work. Ergo, they are not "disabled". See Gordon, 100 F.3d at 912.[7]

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[7] While the decision would seem to run counter to some language in Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993), the dicta included therein concerning the major life activity of "working" is not binding authority on the Court in respect to this ADA cause of action. First, Fitzpatrick was a Rehabilitation Act case. Additionally, insofar as a panel of the Eleventh Circuit Court of Appeals there observed that PFB "would seem to qualify" as a "handicap" under the Rehabilitation Act, id. at 1126, that observation was not part of the holding of the case. See id. ("Although it appears probable that the district court erred insofar as it indicated that the firefighters do not qualify as 'handicapped individual[s]' under 29 U.S.C. §706 (8) (B) (I), *it is not necessary for us to rule on that issue")* (emphasis added). Moreover, the Fitzpatrick panel's dicta has been criticized as incorrect -- and counter to the plain language of the Rehabilitation Act -- by at least one other circuit court. Gupton v. Commonwealth of Virginia, 14 F.3d 203, 205 n.3 (4th Cir.), cert. denied, 115 S. Ct. 59 (1994). Finally, and most importantly, all of the Eleventh

Defendant's motion for summary judgment on Plaintiffs' ADA claims is therefore GRANTED.

(c) Title VII

Title VII prohibits workplace discrimination on the basis of any on of the five specifically-enumerated characteristics which are listed in the statute: race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2 (a) (2). While discrimination on the basis of race, color, religion, sex and/or national origin is prohibited by Title VII, the statute does not prohibit discrimination on other bases. See Nix v. WLCY Radio/Rahall Communications, 747 F.2d 710 (11th Cir. 1984) ("The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason."). Hence, it is important to remember that Title VII protects workers against specific forms of discrimination, and not against general unfairness; for the civil rights laws were

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Circuit ADA cases which have been released after the publication of Fitzpatrick (and which have been previously discussed in this order) indicate that to the extent that Fitzpatrick is deemed good law for Rehabilitation Act purposes, its rationale should nevertheless be treated as inapplicable to ADA cases.

not meant to eliminate the principle of at-will employment for members of protected classes, nor do they require employers to show good cause for every decision involving a member of a protected class. Evans v. McClain of Georgia, Inc., 934 F. Supp. 1383, 1389-90 (M.D.Ga. 1996).

Here, the Court finds that the record is full of deposition and affidavit testimony from individuals who make the allegation that Plaintiffs were the victims of workplace discrimination. The majority of these deponents and affiants go so far as to use the term "race" when describing the basis of alleged discrimination. However, without fail, each of the deponents/affiants has testified that the alleged discrimination to which Plaintiffs were subjected was the result not of racial animus standing alone; rather, they seem to state that it was the result of a combination of Plaintiffs' race and the fact that they wore beards in a setting where beards were not worn by anyone else. See, e.g., *Affidavit of Rusty Dorris* (Doc. 62, Exhibit E) at 2 ("In my opinion, and based on my observations in the workplace, there was no reason for these negative comments other than the fact that Major Clark resented Mr. Harris's and Mr. Seaborn's beards and/or their race."); *Affidavit of Arthur Johnson* (Doc. 62, Exhibit F) at 1 ("It was and is my opinion that Mr. Harris and Mr. Seaborn were singled out by Major Clark and his command staff to be subjected to harassment,

intimidation, and retaliation because of their race and their beards.").

Specifically, the record indicates that Plaintiffs' claims of discrimination are race-based only insofar as the beards which they wore on their faces were a product of their race.[8] During his deposition, for example, Plaintiff Seaborn explained his understanding of why he was never promoted to the rank of sergeant while working at TCCC; the answer was not a simplistic one, such as "I was not promoted because I am black." Instead of responding that he was a victim of what can be termed "pure" race discrimination, Plaintiff said this:

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[8] The concession that this case is not one involving "pure" race discrimination (i.e., discrimination based *solely* on the color of Plaintiffs' skin) is demonstrated clearly by the fact that two of the four positions which Plaintiff Harris desired but did not receive were filled by African-American applicants. *Deposition of Robert Harris, Volume II* ("Harris Deposition") (doc. 55) at 155. Hence, it makes no sense to conclude that Harris' race served as a per se bar to promotion at TCCC; other black employees (albeit *clean-shaven* black employees) did receive the promotions that Plaintiffs allegedly could not receive.

> I guess along with me being black, I have a disability, and they don't want to promote. I am black, with a disability. *I am not just black.* I am black, with a disability.

Deposition of Charles Seaborn, Jr. (doc. 53) ("Seaborn Deposition") at 91 (emphasis added).[9]

In his deposition, Plaintiff Harris' testimony manifested the same belief -- namely, that he was discriminated against not on the basis of race alone, but rather on the basis of his race and his facial hair. See *Harris Deposition* at 106 (indicating his belief that he was discriminated against due to a "combination of both" his "race" and "disability"). As he described it, he was held back because "this was a good old boy situation and beards in DOC just don't cut it," *Id.* at 118, not because he was black employee, per se.

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[9] The so-called "disability" to which he refers, of course, is PFB -- the condition that required him to grow a beard. See *id.* at 73 ("Because that was the issue. Being black and having a beard was the issue. I was not allowed to do this because I was black and I had a beard. That is the issue. And my counterpart is white, with no beard. That is the issue.").

Both of the plaintiffs testified in their deposition that they were told -- in straightforward, explicit terms -- by supervisors at TCCC that they would never be promoted as long as they had beards on their faces. *Seaborn Deposition* at 50 ("I remember Major Clark telling me on an occasion that -- and I want to make this clear, he told me this several times -- that I would never, ever get a promotion in the Department of Corrections with a beard on my face. Never."); *Id.* at 60, lines 8 through 18; *Id.* at 64 ("[Sergeant Durden said]: 'You could probably be major or something if you shaved your beard off.'"); *Id.* at 65, lines 13 through 16; *Id.* at 69, lines 22 through 24; *Harris Deposition* at 117 ("[Major Clark called] me into his office and [told] me, because of my medical exemption, that I will never make a promotion while at DOC with a beard."); *Id.* at 121, lines 11 through 18. Additionally, Plaintiff Harris testified at deposition that he was told flat-out by Major Clark that his personnel record would be cleared of its blemishes if he would just shave off his beard:

> He called me into his office at one time. He said, "I have a proposition for you. Do you want to step in here?"
>
> So, I went in, and I said: "Okay. What is it?"
>
> He said: "What if I agree to take all disciplinary actions out of your file in

> return for you to shave that beard, so that I won't be the laughingstock of the region and the
> Department?"***
>
> All he wanted to do was make sure that no one would tease him or laugh at him for having a black officer with a beard working at his institution.

Harris Deposition at 124, 126.

Based on the foregoing, the Court finds that there is much testimonial support in the record to undergird a conclusion that the plaintiffs were victims of "beard-ism," not racism. And, of course, Title VII offers no protection to one who is the victim of "beard-ist" employment practices. However, accepting that as true, it is not clear that summary judgment would be a permissible disposition of Plaintiffs' Title VII claims under the facts of this particular case, due to the previously-discussed (and contested) correlation between Plaintiffs' beards, their PFB impairment, and their race.[10] Therefore, under the

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[10] Moreover, the Court is aware that there is additional testimony in the record which suggests race-based discrimination unrelated to the "beard-ism" explained above.

facts of this case, discrimination on the basis of Plaintiffs' beards may (but may not) be characterized as an outgrowth of, and hence inseparable from, racial discrimination.

Unfortunately, the pleadings which have been filed in this matter are inadequate[11] and, accordingly, this Court cannot enter an informed legal ruling on Defendant's motion for summary judgment (doc. 49) as that motion relates to Plaintiffs' claims pursuant to Title VII. The fundamental flaw is that Plaintiffs' amended complaint was drafted in such a haphazard and cursory manner that it is impossible -- without engaging in judicial speculation -- to determine what specific type(s) of Title VII claim(s) the Plaintiffs have attempted to raise in this lawsuit.[12] And because the Court cannot

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[11] In particular, the Court here refers to Plaintiffs' Amended Complaint (doc. 24) and Plaintiffs' response to opposition to Defendant's motion for summary judgment (doc. 61).

[12] In other words, it is unclear whether Plaintiffs attempt to state a claim for disparate treatment racial discrimination in the failure to promote context; and/or disparate impact racial discrimination in the failure to promote context; and/or hostile work environment racial harassment.

determine what kind of claim has been raised, it is therefore impossible to determine whether Plaintiff has successfully stated a valid claim such that summary judgment should be denied.

As a result, counsel for Plaintiffs is hereby directed to file an additional memorandum of law in opposition to Defendant's motion for summary judgment. In this memorandum, counsel shall exclusively (and extensively) discuss the specific theories of her clients' Title VII cause(s) of action. In specific, she shall first explain whether this is meant to be a disparate treatment case, a disparate impact case, a hostile work environment case, or any combination thereof. Second, she shall then state the controlling law from this circuit on each of the Title VII race discrimination causes of action which her clients bring against Defendant, including a discussion of the prima facie elements for each brand of Title VII claim. Third, she shall lay out -- with appropriate quotations from the affidavits and depositions which are part of the record -- each and every fact which supports her position that Plaintiffs are able to survive summary judgment on their Title VII cause(s) of action.

Plaintiffs' supplemental memorandum shall be served on opposing counsel when completed, and shall be filed with this court no later that February 28, 1997. After reviewing Plaintiffs' filing, counsel for Defendant

shall file a responsive memorandum of her own. That response shall be filed no later than March 17, 1997.

After the Court receives the additional pleadings, it will enter a ruling on the remaining portion of Defendant's motion for summary judgment.

It is hereby

ORDERED AND ADJUDGED:

(1) Defendant's Motion for Summary Judgment (doc. 49) is GRANTED IN PART.

(2) Defendant State of Florida, Department of Corrections is DISMISSED WITH PREJUDICE from the complaint insofar as it attempts to state a claim against Defendant pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*

(3) Defendant's motion for summary judgment on the Title VII portion of Plaintiffs' complaint (doc. 49) shall be HELD IN ABEYANCE.

(4) Counsel for Plaintiffs shall file a supplemental memorandum of law in compliance with the dictates laid out in this order; said memorandum shall be filed with the Clerk's office in Tallahassee no later than 5:00 p.m. on Friday, February 28, 1997.

(5) Counsel for Defendant shall file a response to Plaintiffs' memorandum; said response shall be filed with the Clerk's office in Tallahassee no later than 5:00 p.m. on Monday, March 17, 1997.

(6) The Clerk is directed to REFER this file back to the Court upon receipt of Defendant's response to Plaintiff's supplemental memorandum.

(7) After the Court receives copies of Plaintiffs' supplemental memorandum and Defendant's response, the Court will enter a ruling on the remaining issues of law arising out of Defendant's motion for summary judgment.

(8) In the meantime, this cause is set for trial by jury during the trial term beginning on Monday, April 21, 1997 at the United States Courthouse in Tallahassee, Florida. The April 21st trial date shall **not** be continued as a result of the matters discussed in this order.

(9) An attorney's conference shall be held at 9:00 a.m. on Monday, April 21, 1997. Jury selection shall commence immediately thereafter.

(10) During jury selection, eight (8) jurors will be selected for the trial of this cause; each side shall be given three (3) peremptory challenges.

(11) The parties have indicated their desire to send this matter to mediation if portions of the cause remain in the aftermath of Defendant's summary judgment motion. The Court hereby accepts the invitation and REFERS THE CASE TO MEDIATION, at a time and place, and before a mediator of, the parties' own choosing.

(12) The Court suggests that the parties act now to schedule a mediation for the week of April 7, 1997; it is anticipated that a ruling on the remaining portions of Defendant's motion for summary judgment will be entered prior to that date.

(13) Mediation shall be completed by Monday, April 14, 1997. The mediator shall file with this Court a written report of mediation no later than Friday, April 18, 1997.

(14) If all issues are not resolved by either the motion for summary judgment or by mediation, the parties shall file written proposed jury instructions no later than Monday, April 21, 1997.

DONE AND ORDERED this 11th day of February, 1997.

S/ Maurice M. Paul
MAURICE M. PAUL,
CHIEF DISTRICT JUDGE

APPENDIX C
OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA AT TALLAHASSEE, FLORIDA DECIDED JUNE 13, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CHARLES SEABORN
and ROBERT HARRIS,

Plaintiffs,

v. CASE NO. 4:96cv168-MP

STATE OF FLORIDA,
DEPARTMENT OF CORRECTIONS,

Defendant,

_____/

ORDER

This matter is before the Court *sua sponte*. On February 11, 1997, this Court entered an Order (doc. 68) granting Defendant's motion for summary judgment on

the Americans with Disabilities Act portions of Plaintiffs' complaint. The order further indicated that Defendant's motion for summary judgment on the Title VII race discrimination portions thereof would be held in abeyance, pending the Court's consideration of additional pleadings which the order directed the parties to file. In conformity with the order, Plaintiffs filed a pleading titled "Plaintiffs, Charles Seaborn's and Robert Harris', Response to Order of February 11, 1997" (doc. 70). Defendant, in turn, filed a separate pleading styled "Defendant's Response to Plaintiff's Response to Order of February 11, 1997" (doc. 71). After reviewing these additional submissions carefully, and in conjunction with the entire record in this cause, the Court finds that the remaining portion of Defendant's motion for summary judgment must be GRANTED.

INTRODUCTION

In the aforementioned order (doc. 68) dated February 11, 1997, this Court was very specific about why the parties were asked to file additional pleadings on the Title VII portions of Plaintiffs' complaint: counsel for the plaintiffs was informed that it was impossible to determine what specific type of Title VII race discrimination claim was stated in the amended complaint. Hence, counsel was told to file an additional memorandum of law. Specifically, that memorandum of

law was to include: (1) a description of whether this matter was meant to state a disparate treatment claim, a disparate impact claim, and/or a hostile environment claim; (2) an explanation of controlling Eleventh Circuit law on each of those Title VII causes of action; and (3) a description of "each and every fact which supports [the] position that Plaintiffs are able to survive summary judgment" on those causes of action, "with appropriate quotations from the affidavits and depositions which are part of the record."[1] *Order dated February 11, 1997* (doc. 68) at 18.

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[1] As the attorneys know, the directive to include precise quotations from, and citation to, the record is based on the local rules of this court. See N.D.Fla.Loc.R. 56.1(A) (requiring party who opposes summary judgment to produce a short statement of facts which "shall reference the appropriate deposition, affidavit . . . or other source . . . by page, paragraph, number, or other detail sufficient to permit the court to readily locate and check the source"); see, also, N.D.Fla.Loc.R. 26.2(A) (prohibiting filing of full deposition transcripts; requiring parties to file only those portions of a transcript which are relevant).

Counsel for the Plaintiffs complied with the first of the Court's three directives: in Plaintiffs' additional memorandum of law, counsel explains unambiguously that Plaintiffs have stated claims for disparate treatment racial discrimination, disparate impact racial discrimination, and hostile environment racial harassment. Counsel has also complied with the Court's second directive: each section of Plaintiffs' memorandum contains a statement of the Eleventh Circuit law which controls. Counsel has not, however, complied with the third directive.

The majority of Plaintiffs' arguments in support of their position that they are able to survive summary judgment are backed up merely by conclusory allegations. Counsel has not, as directed, pointed the Court to relevant portions of the record which can support the claims which Plaintiffs have attempted to raise. For that reason, it is fully evident that summary judgment is now the appropriate disposition of this case.

ANALYSIS

VI. RACE DISCRIMINATION VERSUS BEARD DISCRIMINATION

The Court has already pointed out to these parties that Title VII *only* prohibits specifically-listed types of workplace discrimination -- namely, discrimination motivated by an employee's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2 (a) (2). The statute does not constitute an across-the-board proscription against all unfair or irrational treatment of employees. So, no matter how arguably illogical and inequitable a particular employment policy (such as the Defendant's alleged *de facto* "no beard" promotion policy) may or may not be, it cannot be deemed to run afoul of Title VII unless it effectively discriminates based on race, color, religion, sex or national origin. See Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984).

The Court has explained its view that the record in this case does support allegations of blatant beard-ism. See *Order dated February 11, 1997* (doc. 68) at 13-17. Beard-ism and racism are, of course, different things, however. After reviewing the most recently-filed pleadings, the Court is buttressed in its prior conclusion that the record before it, while demonstrating

unapologetic beard-ism, does *not* support a Title VII claim of racial discrimination.

As counsel for Plaintiffs phrases it in the supplemental memorandum of law, "[s]upervisors within Defendant told both Plaintiffs herein that **their beards were the very reason that they would not be promoted.**" *Plaintiffs, Charles Seaborn's and Robert Harris', Response to Court Order dated February 11, 1997* (doc. 70) at 4 (emphasis added). Elsewhere, counsel argues that "Plaintiff Seaborn should have received a promotion and . . . **'but for' his beard**, this position would have been his," and that Plaintiff Harris "did not apply for promotions because he knew that he would not be promoted **because of his beard.**" *Id.* at 9 (emphasis added). These quoted passages (which are borne out by the full record) sufficiently demonstrate that -- under the argument put forward by the plaintiffs themselves -- Plaintiffs were passed over for promotions not because of their skin color, but, rather, because of their facial hair. Hence, accepting as true Plaintiffs' version of the facts, the unavoidable conclusion is that the plaintiffs were victims of irrational beard discrimination, *not* illegal race discrimination.[2]

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[2] Plaintiffs have asked the Court to follow a winding theory of the case in order to arrive at a conclusion that, under the facts as

B. DISPARATE TREATMENT RACIAL DISCRIMINATION

So-called disparate treatment racial discrimination is nothing more than intentional discrimination against an individual on the basis of his membership or non-membership in a particular racial group. The Supreme Court has provided the following, straightforward

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presented here, beard discrimination and race discrimination are one and the same. In essence, Plaintiffs argue the following: (1) they were not promoted because they have beards; (2) they have beards because their doctors instructed them to grow beards; (3) their doctors instructed them to grow beards because they have a skin condition known as *pseudo folliculitis barbae* ("PFB"); (4) PFB predominantly affects blacks; (5) accordingly they suffer from PFB because they are black; and (6) hence, they are forced to have beards because they are black. It is therefore Plaintiffs' position that while technically-speaking they were passed over for promotions because they have beards, practically-speaking that amounted to a decision to deny them promotions because they are black. Based on that position, Plaintiffs urge that they have presented a meritorious Title VII race discrimination lawsuit. The Court disagrees.

explanation of disparate treatment racial discrimination suits under Title VII: they are warranted when an "employer simply treats some people less favorably than others **because of their race** . . . . " Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (quoted in Armstrong v. Flowers Hospital, Inc., 33 F.3d 1308, 1313 (11th Cir. 1994)) (emphasis added).

Here, Plaintiffs have submitted various pieces of testimony indicating many persons' belief that the two plaintiffs were treated less favorably than other employees of Defendant. Plaintiffs have not, however, submitted testimony permitting this Court -- looking at the record in the light most favorable to their case -- to draw the conclusion that they were passed over for promotional opportunities because of their race. To the contrary, the record is clear that Plaintiffs were treated less favorably than other workers (both white and black alike[3]) because

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[3] As noted in the previous order, two of the four promotions for which Plaintiff Seaborn applied were filled by African-American employees. Moreover, as Defendant notes in its recent pleading, the facility where both of the plaintiffs worked had five supervisory officers (a major, a lieutenant, and three sergeants). While Plaintiffs were still there, an African-American employee was promoted to the rank of sergeant,

they were not clean-shaven. The record plainly indicates that facial hair, and not race, was the determinative factor in the decision to treat the plaintiffs in a less than favorable manner. Thus, it remains apparent that the facts as alleged by Plaintiffs cannot support an action under Title VII.

To establish a Title VII claim for disparate treatment racial discrimination in the failure to promote context, a plaintiff must prove: (1) that he is a member of statutorily protected class; (2) that he was qualified for and applied for the desired promotion; (3) that he was rejected; and (4) that other equally or less qualified employees who were not members of the protected class were promoted. Combs v. Plantation Patterns, 106 F.3d 1519, 1539 n.11 (11th Cir. 1997) (citing Wu v. Thomas, 847 F.2d 1480, 1488 (11th Cir. 1988), cert. denied, 490 U.S. 1006 (1989)).

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and another African-American achieved the rank of lieutenant. *Defendant's Response to Plaintiff's Response to Order of February 11, 1977* (doc. 71) at 10. Hence, the undisputed record evinces that African Americans (albeit clean-shaven ones) were not precluded from advancing through the promotional ranks.

Plaintiffs cannot state a prima facie case under the facts of record in this case. Plaintiffs are African Americans; as such they are members of a racial group entitled to protection under Title VII. It is undisputed, however, that other African American were chosen as the successful applicants for the two of the four promotions that Plaintiff Seaborn desired. Hence, logic dictates that there is a reason other than the plaintiffs' race that they did not receive the promotions they desired. In this case, that reason is patently clear: Plaintiffs wear beards.

Plaintiffs ask the Court to recognize their membership in the "protected class" of persons who are "black and bearded." *Plaintiffs, Charles Seaborn's and Robert Harris', Response to Court Order dated February 11, 1997* (doc. 70) at 6-7. The Court finds that claim of membership in a subclass of persons who are identified as "black and bearded" does not entitle Plaintiffs to special protection under Title VII.

Black employees applied for, and received, half of the promotions for which Plaintiff Seaborn submitted applications. Clearly, then, race was not the factor that motivated Defendant to promote persons other that Seaborn. Plaintiff Harris, on the other hand, never even submitted one application for promotion. And while Harris argues that it would have been futile for him to submit an application for a job given comments made to him by supervisory employees of Defendant, it is

significant to note his explanation for that futility argument. Harris does not suggest that his race would have rendered useless his ability to advance; instead, he states that he "did not apply for promotions because he knew that he would not be promoted **because of his beard.**" *Plaintiffs, Charles Seaborn's and Robert Harris', Response to Court Order dated February 11, 1997* (doc. 70) at 9 (emphasis added).

In conclusion, the Court finds that Defendant's alleged *de facto* policy of refusing to promote employees with beards to supervisory positions cannot amount to disparate treatment racial discrimination actionable pursuant to Title VII. Discrimination on the basis of facial hair is simply not covered by the text of that statute.

G. DISPARATE IMPACT RACIAL DISCRIMINATION

Perhaps in anticipation of the Court's ruling on the disparate treatment claim, Plaintiffs' recently-submitted memorandum of law indicates -- for the first time in this litigation -- that their complaint also states a claim of disparate impact racial discrimination. Plaintiffs have not, however, produced and filed adequate documentation to support such a claim.

To state a prima facie claim of disparate impact racial discrimination pursuant to Title VII, a plaintiff must first identify the specific employment practice[4] that allegedly has a disproportionate impact on a group of persons entitled to protection under the statute. Watson v. Ft. Worth Bank and Trust, 487 U.S. 977, 994 (1988); Armstrong v. Flowers Hospital, Inc., 33 F.3d at 1314. Assuming the plaintiff is able to satisfy that first step, he must next establish causation by offering statistical evidence sufficient to show that the employer's practice has resulted in prohibited discrimination. Watson, 487 U.S. at 994; Armstrong, 33 F.3d at 1314.

As the Supreme Court has explained, disparate impact cases typically focus on statistical disparities and on the various explanations for those disparities. Watson, 487 U.S. at 994. To satisfy the second step of disparate impact case, then, a plaintiff must produce competent evidence -- in the form of statistics -- which shows that the alleged adverse impact from a particular employment policy falls disproportionately on statutorily protected employees. Armstrong, 33 F.3d at 1315; see, also, Edwards v. Wallace Comm. College, 49 F.3d 1517, 1520 (11th Cir. 1995) (holding that plaintiff must present

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[4] Here, Plaintiffs point to the alleged *de facto* policy not to promote employees with beards.

statistical comparison evidence to support his Title VII disparate impact claim).

Here, Plaintiffs have failed to state a prima facie case of disparate impact racial discrimination. Simply put, Plaintiffs offer no statistical evidence whatsoever. Although Plaintiffs make a number of conclusory allegations in their memorandum of law averring that Defendant's alleged *de facto* policy of refusing to promote bearded persons to supervisory positions affects African American employees disproportionately, Plaintiffs offer zero statistical evidence of any kind in support of those allegations. Because the record lacks such statistical proof, the disparate impact claims necessarily fail. See Edwards, 49 F.3d at 1520 (upholding district court's grant of summary judgment on plaintiff's disparate impact Title VII claim because plaintiff "failed to make the required statistical comparison")[5]

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[5] In the memorandum of law, counsel for Plaintiffs attempts to justify her complete lack of statistical evidence through an unverified averment in a footnote which states that one potential witness told counsel that "he could not perform a statistical analysis." The Court finds that counsel's statement does not excuse these would-be disparate impact plaintiffs from their obligation to set forth a prima facie case.

H. HOSTILE WORK ENVIRONMENT RACIAL HARASSMENT

To set forth a prima facie case of hostile work environment racial harassment under Title VII, a plaintiff must establish that: (1) he belongs to a protected class; (2) he was subjected to unwelcome racial harassment; (3) the harassment was based on race; and (4) the harassment affected a term, condition, or privilege of employment. Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982); Dudley v. Wal-Mart Stores, Inc., 931 F.Supp. 773, 791 (M.D.Ala. 1996). Once again, the Court finds that Plaintiffs are unable to set forth a prima facie case.

The Court has already explained its conclusion that the alleged differential treatment of Plaintiffs was due to the plaintiffs' beards, and not their race. As the Defendant notes, all of the evidence that Plaintiffs have submitted indicates that they were discriminated against either because of their facial hair, or that they were victims of general harassment. The Court therefore finds that Plaintiffs have not satisfied the third prong of this four part prima facie case: the full record demonstrates that the alleged harassment to which Plaintiffs were subjected

was based on their beards, not their race.[6] As such, the

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[6] The Court is, of course, aware that Plaintiffs have presented one or two specific examples (referenced briefly at footnote ten of the Court's prior order) of racially offensive comments/acts by Plaintiffs' co-workers. Counsel for Plaintiffs has, through the additional pleading, been given a second opportunity to lay out "each and every fact" supporting the hostile environment claim; based on the Plaintiffs' submissions and the complete record, the Court finds as a matter of law that Plaintiffs have *not* met their burden in opposition to Defendant's motion for summary judgment on the hostile environment portion of the Title VII cause of action. See Sullivan v. Nat'l R.R. Passenger Corp., 1996 WL 815394, *2 (S.D.Fla. 1996) (noting that courts are reluctant to allow plaintiffs to proceed on hostile environment claims which are based on isolated incidents); and Ellis v. Wal-Mart Stores, Inc., 952 F.Supp. 1522, 1527 (M.D.Ala. 1996) ("It is well established that isolated and sporadic incidents of harassment are insufficient to create a hostile working environment") (citing Rogers v. E.E.O.C., 454 F.2d 234, 237-38 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)); and Lewis v. Zilog, 908 F.Supp. 931, 956-57 (N.D.Ga. 1995).

hostile environment claim necessarily fails.

It is hereby

ORDERED AND ADJUDGED

(1) The portion of Defendant's Motion for Summary Judgment (doc. 49) which was held in abeyance by the Court's Order dated February 11, 1997, is now GRANTED. This case is DISMISSED WITH PREJUDICE.

(2) The jury trial scheduled for June 23, 1997, is CANCELED.

(3) The clerk is directed to CLOSE the case.

DONE AND ORDERED this 13th day of June, 1997.

Maurice M. Paul
MAURICE M. PAUL,
CHIEF DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
No. 4:96cv168MMP

CHARLES SEABORN and ROBERT HARRIS

V.

STATE OF FLORIDA,
DEPARTMENT OF CORRECTIONS

Maurice M. Paul, Chief Judge

Jury Verdict. This action came before the Court and a jury with the judicial officer names above presiding. The issues have been tried and the jury has rendered its verdict.

- **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate judge) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of defendant State of Florida, Department of Corrections and against plaintiffs Charles Seaborn and Robert Harris. This case is dismissed with prejudice.

Robert A. Mossing, Clerk
June 16, 1997
By Deputy Clerk: Diane Snell
s/ Diane Snell

ENTERED ON DOCKET
June 16, 1997 BY ds